Volume 90 Number 872 December 2008

INTERNATIONAL REVIEW of the Red Cross

Interview with Sergio Jaramillo Caro*

The Honourable Sergio Jaramillo Caro is the Colombian Vice-Minister of Defence. Mr Jaramillo Caro studied philosophy and philology at Trinity College, University of Toronto, and Corpus Christi College, University of Oxford. He has an M. Phil. in philosophy from Cambridge University and was a doctoral candidate in Greek at the University of Heidelberg in Germany. He has been an adviser to the Ministry of Foreign Affairs, was in charge of diplomacy for peace (2000–1), and was political counsellor at the Colombian embassy in Paris (2001–2). He was also adviser for political and strategic affairs at the Ministry of Defence (2002–3) and drafted the policy of Democratic Security. From 2004 to 2006 he served as director of the Ideas for Peace Foundation in Bogotá.

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Modern armed conflicts are seeing an increasing civilian participation, and more and more civilians are affected directly by conflict.

It is well known that in many armed conflicts of today's world, it is increasingly unlikely that a soldier will be involved in conventional combat and that, on the contrary, he will find himself operating instead, in Rupert Smith's phrase, 'amongst the people'. The challenges of operating in this environment are enormous; they have been seriously underrated by the academic commentators. It is obvious that the civilian population can never be the enemy and that we must do everything to protect it. But where is the line that divides a 'civilian' from a 'combatant'? That is an extremely tricky question, especially when the enemy uses and abuses the civilian population for his own purposes.

How do you view this development's effect on Colombia?

Colombia's experience is in many ways at the forefront of some of the problems in the application of international humanitarian law (IHL) today. Let me give you

* The interview was conducted on 11 December 2008 by Toni Pfanner, Editor-in-Chief of the *International Review of the Red Cross*, Nils Melzer, legal adviser at the ICRC and principal author of *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, and Kathleen Gibson, assistant editor of the *Review*.

https://doi.org/10.1017/S1816383109000289 Published online by Cambridge University Press

two examples of what I mean. First, it is well known that all conflict situations are dynamic and that people change their behaviour strategically. At one stage, you may think that everything is quite clear, and soon after you find that you're facing a different situation and you no longer know exactly what the rules are. Take the case of the FARC (Fuerzas Armadas Revolucionarias de Colombia). Six or eight years ago, we did not need to think too much about who the FARC were, because it was comparatively easy to identify them. They operated in large formations, they wore uniforms and they carried assault rifles. The curious thing, the paradoxical thing, is that the better you do at improving security, the tougher the problem gets, because they lose their 'markers': they stop wearing uniforms, they hide their weapons and they move in small groups. FARC has actually prohibited their fronts from operating in company-size formations.

At the same time, because they are losing combatants in record numbers owing to desertions (more than 3,000 last year) and captures, they have been forced to make more use of their support militias in a combat role. So the issue of who is part of the 'fighting' organization becomes blurred, and that makes the issue of deciding on 'direct participation' all the more difficult.

The other example is even more challenging. Many armed groups today defy the traditional logic of international humanitarian law. Because drug trafficking, like any criminal enterprise, develops its own protection structures, we have in Colombia a whole range of what we call 'criminal bands', which are in effect armed groups that are trained and financed by the traffickers to protect their labs, routes, etc. Some of these groups go around in large numbers with AKs, recruit people who have military training and seem to have a chain of command. In this situation a country like Colombia, or any country, de facto does not have an option but to use military force against them when they overwhelm the capacity of the police. But are you in an armed conflict with them? They certainly defy state sovereignty by trying to control territory in order to protect their trafficking routes, but they have absolutely no ideology and there is no obvious sense in which, in IHL terms, they are a 'party' to anything, except to their own criminal interests. The same thing is going on in northern Mexico, where the situation is even worse. The Mexican cartels have large groups of extremely well-armed and trained men – some are even old hands from the Central American conflicts – which are fighting a vicious war for control over the key smuggling routes into the United States. The Mexican police are helpless, so they had to call in the army.

Would you qualify such situations as an armed conflict?

I think we should worry less about whether we characterize these situations politically as an armed conflict, and more about how the armed groups behave and whether they fulfil certain conditions. Whether they have a certain level of organization, whether they operate with a strength that de facto can only be countered by the military, and so forth. And we should worry about making sure that if the military is engaged in offensive operations, the protection of international humanitarian law is extended to the population. It seems to me easier to deal with

https://doi.org/10.1017/S1816383109000289 Published online by Cambridge University Press

the problem if we work on clarifying objective criteria for the application of IHL and we make sure the protection is there, rather than getting tied up in a political discussion about whether X or Y constitutes an armed conflict or not. Of course, we also need safeguards so that countries don't use any excuse to make a liberal use of their armed forces when they simply have a police problem. But at least in the case of Colombia, sometimes the only way we can make sure that we regain our sovereignty in every corner of our territory is with a military operation that creates the security conditions that open the space for the rule of law. Only when there is enough security can the justice system work.

But legally it could be an armed conflict, as international humanitarian law does not consider the reasons why arms are taken. The non-state actor may fight for communism, capitalism, liberalism, whatever ideology. It could therefore be an armed conflict against drug traffickers or other organized criminals as long as they fulfil those objective criteria.

It may turn out that we are in agreement on a legal characterization that encourages the application of IHL. But one needs to be careful about the political and strategic consequences that may flow from that characterization. So rather than actually saying 'this is an armed conflict', what matters is to be able to say 'this is the kind of force I need to use because these criteria have been met'.

There seem to me to be two reasons for this. First, in this kind of situation, more than facing an enemy, what you are actually doing is trying to re-establish the rule of law. You want to win the battle of governance, you want to show that you are the legitimate authority. And the opposition may be an armed group with some remnants of an ideology, or it may be a bunch of drug traffickers with a military arm or a mixture of both. Increasingly, you will be confronted with the latter. In that sense, it is immaterial whether you call that 'a conflict'; the truth is that in practice your military operations are enablers for law enforcement.

Are you referring to situations where the military is engaged essentially in law enforcement action, and not in a clear battle situation?

No, I think what you have is a continuum, with the use of pure military force at one end and normal law enforcement activities at the other. The military operates where the law enforcement agencies are overwhelmed by the military threat, and that may well include some battle-like situations. At the same time, it is not always easy in practice to draw a distinction. What are the various troops that are chasing Al Qaeda in Afghanistan doing? Are they engaged in law enforcement against terrorists, or are they in a combat function? Is there a difference between the two?

Are criteria other than legal ones equally important?

Yes. The point is that, for obvious political reasons, many countries would be reluctant to call situations such as the one you have described 'an armed conflict'. This may actually create perverse incentives, and that is the second point I wanted to make. If anybody who can raise 300 young men and arm them with assault rifles

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becomes de facto a political actor, a 'party' to a conflict, with all the privileges that that entails, then you run a very big risk of creating perverse incentives: certain organized crime organizations will start raising armies so that they can actually gain 'political' status and solve their legal problems through negotiation. This is not just a hypothesis, it is exactly what happened in Colombia in 2005, when the government negotiated with the paramilitary groups their demobilization and the big drug traffickers of the Norte del Valle cartel started raising armies and using unheard-of acronyms in order to get their foot through the negotiation door. In the end, you end up multiplying the problem, instead of reducing it.

Think about the problem also from the perspective of the obligations of the ICRC. Are the ICRC delegates going to start visiting drug traffickers in prison just because they run mercenary armies? That would be a little odd, wouldn't it?

Are there changes in the way that non-state actors operate with regard to civilians?

The case of the FARC that I mentioned is a good example. The traditional structure of the FARC has been to have an armed core of combatants who are grouped in what they call 'fronts'. They have around them two or three different circles of militias who traditionally have had logistic and intelligence-gathering functions. What has happened is that the weaker the centre – the armed core – has become, the more the FARC has been forced to recruit within its own larger structures. They made those who were essentially civilian support militias part of the fighting force, either by 'enlisting' them, or by giving them increasingly military-like functions. To lay minefields as the troops march past, snipe at the army, and that sort of thing. So the border, as I said, has become much less well-defined and the situation has become much greyer, which makes the issue of direct participation in hostilities and who is a legitimate target much more difficult to solve.

There are various layers of civilian participation in hostilities. You mentioned that there are individuals in the inner and outer circles of the FARC. What are their contributions to a conflict situation? Are those of the outer circles considered to be members of the FARC, even if they have a loose relationship? How do you define the grey area between supporters and full-blown combatants in an armed conflict?

Let me make a few points. The first general point is that in the case of a difficult internal security situation such as we have had, it is obvious that those who are organized into clearly distinguished fighting units are the least problematic. But even here there are still some problems, as these groups do not always follow what you might call a classic military logic when facing an attacking enemy. We have groups like the ELN (Ejército de Liberación Nacional), who pretend to have an ideology, are organized and clearly have a chain of command, but who do everything possible to avoid confronting the army. They are these days much busier with the drug trafficking business and making sure that those small remote parts of the country where they have a presence remain under their control.

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A typical situation in Colombia will be for an army unit to arrive at point A, in a rather unpopulated part of the country. Let's say they will try and move by land to point C, where they have information that there is a FARC camp, in the mountains. This corresponds to a more or less real example. To get to point C, they have to pass point B, a valley where there are a few small villages and hamlets, and where the FARC have a large number of militias who operate as a kind of early warning intelligence net. The FARC will get those militias to launch the first attack against those army units. They will get them to put minefields along the way, and they will get them to snipe at them. In fact, they put them into a combat role, and that causes us serious legal problems.

Would you consider them members of the FARC, and could they be a lawful target of attack?

They could reasonably be considered members of the FARC. But the issue is not just one of membership or organization. The militias are organized and they know who they are. Let's imagine that the issue of membership is resolved, and that we can determine with certainty that these people are FARC members. It may still not be in our interest to try to find and kill those people. And there we get to the delicate question of how to regulate the use of force, and what your use of force should be vis-à-vis the group that is attacking you.

I would take a step back and ask a more basic question: what is it all about? If I may repeat myself, the whole issue for us is about re-establishing the rule of law. Accordingly, the use of force has to match that goal. You want first to find ways in which you can possibly capture them, given the area where they are and the weapons they have. An example I often use is if you have some FARC members going through the middle of a national park where they are conducting military operations against you, you may lay an ambush and get them. Legally, that seems to us unproblematic if the basic principles of IHL are observed. However, if those same four members walked into a village to do an intelligence operation, intuitively it clearly would be unacceptable to send a military unit in to just shoot them. If you can capture them, do.

In the end, it seems to us that what you have to do is to modulate the principle of military necessity of IHL by including a human rights element.

Basically, what you're saying is that humanitarian law – or the law of armed conflict – would allow you to go further than a well-understood rule of law?

Exactly.

But even the principles inherent in international humanitarian law – namely military necessity and proportionality – require modulating behaviour during hostilities.

Yes, but as is well-known, proportionality means something quite different in IHL and in human rights law. And it is an issue of not just subtle but key differences in the basic human rights and IHL concepts; it is a question of *the logic* from which you are operating. Here we come to the issue of the relationship between the IHL

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regime and the human rights regime. It is easy to make mistakes here and to get things in the wrong order. The official position, that we have assumed publicly in the *Comprehensive Human Rights and IHL Policy* of the Ministry of Defence (MoD), is that we regard IHL as *lex specialis* to human rights law in those situations where, mainly because of the level and organization of the violence, you have to conduct offensive military operations. However, we have also said that we fully recognize that human rights obligations remain in force. That is the standard interpretation of what IHL as *lex specialis* means, even if not all countries follow it.

But it can be taken one step further. When applying IHL in such contexts, I actually want to use the human rights principle – if it is practical and possible – of making sure that I capture instead of killing or wounding, because that furthers my goal of consolidating the rule of law. In the example I gave you about the FARC members walking into the village, you might say that the IHL principle of humanity would prevent you just as well from simply shooting those people up. Certainly, but the more basic point is that the logic guiding my efforts is a human rights logic.

The European and Inter-American Court are aiming in the same direction when applying human rights to conflict situations.

Not quite. The application by the European Court of Human Rights of human rights standards to conflict situations, irrespective of what the conditions are, seems to me more than a little wrong-headed. You cannot pretend in the middle of battle-like situations to treat the problem as you do in times of normality and measure everything by human rights standards: where the bomb was dropped, where the troops were, and so forth. You end up deforming and in the long run actually *weakening* the whole human rights framework. It is not just impractical; it is dangerous for the protection of human rights. That is why I think you have to get things in the right order and apply IHL where the violence reaches certain levels of intensity and those engaged have a military-like organization.

Also, in a situation which has reached a certain level of hostilities you will necessarily have a corresponding level of indeterminacy, so you have to measure things with the right standard, which again is IHL. The really difficult question for us is not what to do in what you might call clearly IHL contexts or in human rights contexts, but in the grey area between the two. We have called our security policy the policy of consolidation, and that means that we want progressively to reduce the application of IHL as we continue to make headway in the extension and consolidation of the rule of law.

But along the way, you run into situations such as the ones I described with the sniping or scouting militias, which are a challenge. Again, the solution we have found is not just to sort out the difficult question of direct participation in hostilities by determining membership, but to rethink what military necessity means in these contexts and to modulate that principle with the human rights principle of capturing or demobilizing first and using lethal force as a last resort. And this is not just theory. It is a standing order of December 2007 of the General Commander of the Armed Forces.

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Some individuals do not necessarily voluntarily participate and are forced to fight; others only morally support the enemy. Can we say that the involuntary participant or the wife who supports her husband and cooks for him when he goes in the evening to fight is directly participating in the hostilities? What about moral support?

You have to go on a case-by-case basis. And again, the question is, what are you trying to do? In our case, in our country, we want to strengthen the rule of law. And we have an extremely active and rigorous Prosecutor General's office that mostly sees the situation through the lens of a human rights framework and the ordinary national justice system. In Colombia, it would be out of the question to regard somebody as a bona fide target simply because they're someone's cook. Even targeting someone because they are providing logistic support would be difficult. This is because the space for IHL in Colombia, with the success of the security policy, is becoming ever smaller. And that is as it should be.

How do you involve the judiciary in this distinction process?

What you want to do is really to seriously improve your co-ordination with the justice system, and make sure that you have prosecutors at your side working with you. In Colombia, this is not easy because of the size of the country, and the remote areas in which the army operates. Still, that support is key for us and in the end is the easiest way of guaranteeing that you don't make mistakes. Imagine the Colombian army is operating in a very remote area, and let's say that the army has very good intelligence that there are a number of people who live in a village who belong to the FARC militias. Instead of banging our heads and wondering whether these people should be a military target or not, a much better solution is to co-ordinate with our judiciary. You pass on the information to the judiciary for them to investigate, and you arrest them. This is actually what we are doing, and are trying to expand.

In a country like Afghanistan, where there is hardly a functioning judiciary, what do you do with those people you cannot prosecute? How do you balance the involvement of the judiciary in this situation, given that these are tense situations typically led by the executive?

It is true that co-ordination with the judiciary in a place like Afghanistan is a very different proposition, but you want to use the pressure of the security situation precisely to get some form of judiciary up and running. Otherwise, there is no way out, unless the United States and the NATO troops want to stay there for the next few decades.

A working judiciary is especially urgent because there's always a direct relationship between the effectiveness of the judiciary and human rights violations. When the troops and the police see that the justice system works, they are less tempted to take justice into their own hands.

Still, solving the practical problems of coordination is not always easy. Armies operate 24/7, as the Americans would say, while prosecutors tend to be civil

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servants who naturally tend to be risk-averse and want to spend the weekend with their families. To solve those problems, we've created what we have called 'Support Structures', which are special units of the Prosecutor General's Office which are lodged within army compounds in areas that you might still call 'red'. The army gives the prosecutors protection and provides a security perimeter when the judicial police goes out to the field to investigate, but the prosecutor retains full autonomy. It is always the prosecutors who conduct investigations, never the military. This has actually worked very well.

Let me give you a concrete example. In the north-east of the country, on the border with Venezuela, is a department called Arauca, through which a very important pipeline runs. In the year 2001, the ELN and the FARC managed to bomb the pipeline 170 times between them. They brought production to a standstill, which meant huge losses in income, especially for Arauca, much of whose budget depends on oil royalties. Now, you might say: that's a very hostile area to have a pipeline, what shall I do? You could have troops going up and down the pipeline shooting up anybody that gets anywhere near. That is one solution. Or you can do what we did, and create a Support Structures-type special unit of the judiciary. You bring them into the field, to areas where they would not be able to operate normally because it is too dangerous. With this protection, these prosecutors can actually start understanding the modus operandi of the terrorists and bringing them to justice. When they start arresting and prosecuting people, it actually becomes a much more powerful threat than anything the military can do. As a result, if I remember correctly, after a year of this Support Structure unit working, the attacks went from 170 to about thirty. So there are practical tools that can help you solve the problem.

On the government side, it is also a difficult task to distinguish between combating forces, or those who are directly participating in hostilities, and those who are also part of the army who are not in a combat function. Increasingly, there is also a sort of privatization of armed conflict from this side. In the war in Iraq, for example, the Alliance privatized some combat functions that are no longer exercised by the military, but by private military companies instead. Thus, without being combatants in the legal sense, they can also directly participate in hostilities. Do you see a trend towards making the army narrower and, at the same time, giving more combat functions to civilians?

No, certainly not in the case of Colombia. We do not outsource anything that has to do with combat operations, and even protection functions are carried out by the army. So on the government side, the structure has remained stable.

But there are also paramilitaries who are directly participating in conflict situations.

Historically, the situation in Colombia with the paramilitaries, who have now demobilized, had two sides. It had what you might call a counter-insurgent, self-defence side with private militias offering protection against guerrilla kidnapping

https://doi.org/10.1017/S1816383109000289 Published online by Cambridge University Press

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in rural areas – which quickly turned into a kind of protection racket itself – and it had a purely criminal drug-trafficking side. The trend was, as always happens, for the drug-trafficking criminal side to get the upper hand.

You can draw a good parallel between the paramilitary situation in Colombia and what the United Kingdom faced in Northern Ireland, although the scale of the problem was obviously different: the British army tried to bring the IRA (Irish Republican Army) under control, and, at the same time, the loyalist militias were also combating the IRA, causing the army not a few problems. This kind of tripartite structure is also what we had in Colombia. Of course, whatever you do, you're open to accusations of links between the army and paramilitary militias, because some will claim that the two fight side by side. But we negotiated their demobilization, which was not at all easy: they had turned into veritable warlords in their regions and they had the most appalling record of atrocities. I think we have enough evidence from the last six years, of combat deaths and captures of paramilitaries, to show that they were seriously chased down by the army.

The goal of any government is to have a monopoly on power . . .

Absolutely. Basically what you're trying to do is to enforce the right to protection of all your citizens. The government's Democratic Security policy, which has set our guidelines, has at its centre the protection of the population and the strengthening of the rule of law as the most effective instrument to guarantee that protection. Constitutional theorists will quite rightly tell you that if you cannot even guarantee the right to life, you have no basis on which to build an adequate system of protection of rights. The key in any case is for the state to show its citizens that it can deliver, that it will protect them and that they in turn will owe it allegiance.

In situations where the state is basically non-existent, such as in Somalia, the militias take on state functions. The weaker the state is, the stronger the militias are?

Definitely, you could say there is a direct relationship between the two. In the end, everything is about protection. On the one hand, you have people claiming for themselves the right of protection with the argument that they are not being protected by the state. So, you have to show the people that you can protect them. On the other hand, there is what you might call the 'third vector', which involves a criminal element – certain forms of organized crime, including drug trafficking – which requires its own protection to be successful. These criminal organizations must develop their own protection mechanisms to, amongst other things, keep others from taking over their illegal business. Unless the state has a monopoly on the use of force and enforces the rule of law in countries that are threatened by these kinds of organized crime structures, there is a very serious risk of all kinds of militias turning up who either claim for themselves the right to protection and/or are protecting criminal organizations. If you leave a security vacuum, others will fill it.

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How useful could a product providing guidance on civilian/participant distinction be for operational forces? Do you see a potential interest for the armed forces to have something that can be incorporated in rules of engagement and manuals?

The greyer the situation gets, the more help the military needs. At the MoD we did a review, following on the security successes of the last five to six years, of all our IHL and human rights training, to make sure it matched the new situation on the ground. Under the guidance of Minister Santos, we produced a new policy to accommodate our use of force to those particular grey situations. And we will soon publish a new operational law manual, a first in Colombia, to help our commanders and legal advisers in the field steer their way through the jungle that is the Colombian legal system.

A commander or a soldier on the ground needs as much help as he can get because things really are often not very clear. It's very unfair to those people who are made to make the difficult calls, and who sometimes make mistakes. They're the ones who pay for it, not the commanders further up or those politically responsible. So I think it is extremely important to develop adequate tools. The challenge is whether the tools we develop match the situations on the ground. And that's where I have some doubts, because the things we are seeing now on the ground in Colombia really seem to stretch the framework of IHL to the limit. There is a mismatch between the concepts, 'party to a conflict' and so forth, and the reality on the ground of criminal organizations with military strength that cannot be dealt with simply with law enforcement tools.

This interpretive guidance, however, is clearly designed for this framework and should apply in situations of armed conflict. It cannot address all questions and it is not designed to address law enforcement questions.

Certainly, but if IHL doesn't renew itself on the basis of the objective changes on the ground, it risks becoming irrelevant because it will no longer offer adequate guidance. I think it is very important to engage in this kind of exercise so that IHL remains relevant. Different countries, not just us, are compelled to use military force when they face certain kinds of military threats. But, again, that military character does not necessarily match the traditional IHL description in all situations. And if the interpretative guidance is out of step with reality, what use is it?

I think there is something very unfair in the modern world about the way the military is used. They're put into situations for which they were not made. Historically a soldier has been trained just to kill his opponent. What they find now are situations which are much greyer, and they're made to carry all the weight of those decisions. And if mistakes are made, it is their heads that will roll.

Certainly, there are things you can do: improve the training and adapt it to life-like situations, introduce adequate rules of engagement, etc. And we insist on the strategic value of restraining and controlling adequately the use of force, especially lethal force, so that it does not operate against the very objectives of the reinstatement of the rule of law. But you need a very mature military to have that

https://doi.org/10.1017/S1816383109000289 Published online by Cambridge University Press

sink in to the last man, when every day you are confronted with extremely tense and dangerous situations. Look at what is going on with civilian deaths in Afghanistan – the United States and NATO seem to be heading for strategic defeat if they don't change their ways. But changing the behaviour of their soldiers is not going to be easy.

In any case, I think the soldiers need all the help they can get. We must make sure that guidelines and training are actually and sufficiently linked to the reality on the ground, that they are of relevance to the situations that the soldiers face every day. That seems to me to be the key.

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